



COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

290630077

AT RICHMOND, JUNE 22, 1999

PETITION OF

STARPOWER COMMUNICATIONS, LLC

~~1~~ CASE NO. PUC990023

For Declaratory Judgment  
Interpreting Interconnection  
Agreement with GTE South, Inc.

and

PETITION OF

COX VIRGINIA TELECOM, INC.

v.

CASE NO. PUC990046

GTE SOUTH, INC.

For enforcement of interconnection  
agreement for reciprocal compensation  
for the termination of local calls  
to Internet Service Providers

PRELIMINARY ORDER

The Commission issues this Preliminary Order in the above-captioned cases, while reserving judgment on whether these cases should be consolidated.

Petition of Starpower

On February 4, 1999, Starpower Communications, LLC ("Starpower") filed a petition for declaratory judgment against GTE South Incorporated ("GTE") seeking enforcement of a certain Interim Interconnection Agreement between Starpower and GTE ("Starpower Agreement"), which is based upon Starpower's

adoption, pursuant to § 252(i) of the Telecommunications Act of 1996 ("the Act"), of an interconnection agreement between GTE and MFS Intelenet of Virginia ("MFS").<sup>1</sup>

On April 24, 1998, GTE filed copies of Starpower's adoption of the interconnection agreement between GTE and MFS. GTE's cover letter stated that the filing was made under § 251(i) of the Act and that "GTE is not voluntarily entering the agreement with Starpower and does not waive any rights and remedies it has concerning its position as to the illegality or unreasonableness of the [adopted] MFS Agreement's terms."<sup>2</sup>

Starpower states that GTE has taken the position that it will not make payments to Starpower for reciprocal compensation for the transport and termination of telephone exchange service traffic handed off by GTE to Starpower for termination by Starpower to its exchange service end users that are Internet Service Providers or Enhanced Service Providers (collectively "ISPs"). Starpower relies upon the adopted agreement's requirement that the parties will pay such compensation for the transport and termination of "Local Traffic." Starpower

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<sup>1</sup> The interconnection agreement by and between GTE and MFS Intelenet of Virginia, Inc. was approved by this Commission in an Order Approving Agreement, Case No. PUC970007, issued July 9, 1997.

<sup>2</sup> The Commission took no action on this filing. However, on May 21, 1998, the Director of the Division of Communications sent a letter to GTE advising that no action would be taken "as the parties apparently do not consider it to be an interconnection agreement adopted by either negotiation or arbitration which requires approval under Section 252(e) of the Act."

requests that the Commission enter an order affirming an earlier Commission decision<sup>3</sup> that calls to ISPs are local for purposes of reciprocal compensation.

We conclude that MFS should be made a party in this proceeding, as it concerns the interpretation of its interconnection agreement with GTE.

#### Petition of Cox

On March 18, 1999, Cox Virginia Telecom, Inc. ("Cox") filed a petition requesting enforcement of an arbitrated interconnection agreement with GTE ("Cox Agreement") which the parties entered into under §§ 251 and 252 of the Act and which this Commission approved.<sup>4</sup> Specifically, Cox seeks a declaratory order that local calls to ISPs constitute "Local Traffic" under the terms of the Cox Agreement and that reciprocal compensation is due for such calls. Cox further seeks this Commission's enforcement of the reciprocal compensation obligations for ISP-bound traffic under the Cox Agreement.

NOW THE COMMISSION, upon consideration of both of the above-captioned matters, is of the opinion that both petitions should be docketed and that GTE shall be made a Defendant party in these two proceedings pursuant to Rule 4:5 of the

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<sup>3</sup> Petition of Cox Virginia Telecom, Inc., Case No. PUC970069, 1997 SCC Ann. Rep. 298 (Oct. 24, 1997).

<sup>4</sup> Case No. PUC960118, Orders issued May 1, 1997, and May 30, 1997.

Commission's Rules of Practice and Procedure. We direct GTE to file responsive pleadings in both cases. In addition, Starpower and Cox may file their replies thereto.

GTE is requested to address in its responsive pleading how the Federal Communications Commission's ("FCC's") February 26, 1999, ruling on reciprocal compensation<sup>5</sup> may affect the duties of reciprocal compensation addressed in these petitions and this Commission's subject matter jurisdiction.

The filings by all parties should include their respective comments on whether or not these proceedings should be consolidated to expedite this Commission's consideration of the issues of law and fact raised.

The Commission is of the opinion that other parties may have an interest in the outcome of these proceedings. Therefore, we will also permit interested parties to file comments when the replies of Starpower and Cox are due. Accordingly,

IT IS THEREFORE ORDERED THAT:

(1) The Petition of Starpower is docketed and assigned Case No. PUC990023.

(2) The Petition of Cox is docketed and assigned Case No. PUC990046.

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<sup>5</sup> In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Inter-Carrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68 (Feb. 26, 1999).

(3) On or before July 7, 1999, GTE shall file its separate responses to the petitions of Starpower and Cox as provided above. GTE's responses shall address how the FCC's February 26, 1999, ruling on reciprocal compensation may affect the duties of reciprocal compensation addressed in the petitions and this Commission's subject matter jurisdiction. Further, GTE may file comments regarding whether Case No. PUC990023 and Case No. PUC990046 should be consolidated.

(4) On or before July 19, 1999, Starpower and Cox shall file their respective reply to GTE and may include comments on whether Case No. PUC990023 and Case No. PUC990046 should be consolidated.

(5) Any interested party may file comments on or before July 19, 1999, consistent with the findings above.

(6) The above-captioned matters are continued generally.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Russell M. Blau, Esquire, and Michael L. Shor, Esquire, Swidler, Berlin, Shereff, Friedmann, 3000 K Street, N.W., Suite 300, Washington, D.C. 20007; Louis R. Monacell, Esquire, and Robert M. Gillespie, Esquire, Christian & Barton, L.L.P., 909 East Main Street, Suite 1200, Richmond, Virginia 23219-3095; Stephen C. Spencer, Regional Director-External Affairs, GTE South Incorporated, Three James Center, Suite 1200, 1051 East Cary Street, Richmond, Virginia 23219; Richard D.

Gary, Esquire, Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219-4074; Eric M. Page, Esquire, LeClair Ryan, 4201 Dominion Boulevard, Suite 200, Glen Allen, Virginia 23060; the telephone companies in Virginia as identified in Appendix A, attached hereto; the interexchange carriers identified in Appendix B, attached hereto; John F. Dudley, Senior Assistant Attorney General, Division of Consumer Counsel, Office of Attorney General, 900 East Main Street, Second Floor, Richmond, Virginia 23219; and the Commission's Divisions of Communications, Economics and Finance, and Public Utility Accounting, and the Office of General Counsel.

A True Copy  
Teste:

*Joel H. Beck*  
Clerk of the  
State Corporation Commission





COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

PETITION OF  
STARPOWER COMMUNICATIONS, LLC

For Declaratory Judgment  
Interpreting Interconnection Agreement  
with GTE South, Inc.

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CASE NO. PUC990023

**ANSWER**

COMES NOW GTE South, Inc. ("GTE"), by counsel, and responds to the Petition For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc. and Directing GTE to pay reciprocal compensation for the termination of local calls to Internet service providers ("Petition") filed by Starpower Communications, LLC ("Starpower") with the State Corporation Commission ("Commission") on February 3, 1999. Because Starpower makes numerous legal conclusions in its Petition and in light of the Commission's invitation to address particular legal issues, GTE submits a Memorandum of Law in support of this Answer. GTE expects, however, to have the full opportunity in this proceeding to make all legal arguments and present evidence applicable to the relevant facts of this case. GTE does not waive any such arguments by excluding them from the Memorandum of Law.

The first three paragraphs of the Petition are not numbered and amount to self-serving preamble misstating applicable law. GTE responds to the legal conclusions set forth in the first three paragraphs in GTE's Memorandum of Law accompanying this Answer. To the extent a response to the first three paragraphs is necessary in this Answer, GTE denies the factual allegations.

The following are responses to numbered paragraphs provided in the Petition:

1. In response to the first numbered paragraph of the Petition, GTE admits the factual allegations contained in that paragraph.

2. In response to paragraph No. 2 of the Petition, GTE admits the factual allegations contained in that paragraph.

3. In response to the first sentence of paragraph No. 3 of the Petition, GTE states that the language in the Interconnection Agreement between GTE and MFS Intelenet of Virginia ("Agreement") adopted by Starpower pursuant to §252(i) of the Telecommunications Act of 1996 ("Act") says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations of paragraph No. 3 of the Petition.

4. In response to paragraph No. 4 of the Petition, GTE states that paragraph No. 4 of the Petition does not contain any factual allegations pertaining to the purported dispute between GTE and Starpower arising from the Agreement, so no response appears to be necessary. To the extent a response is necessary, GTE admits that correspondence regarding the Petition should be sent to Starpower's attorneys. GTE denies the remaining factual allegations in paragraph No. 4 of the Petition.

5. In response to paragraph No. 5 of the Petition, GTE states that it is unethical for Starpower's attorneys to contact GTE directly, instead of GTE's counsel, after the filing of this lawsuit. Therefore, GTE denies the factual allegations contained in paragraph No. 5 of the Petition.

6. In response to paragraph No. 6 of the Petition, GTE states that paragraph No. 6 appears to constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE has no knowledge of Starpower's "interest" in this proceeding.

7. In response to paragraph No. 7 of the Petition, GTE states that paragraph No. 7 appear to be a part of Starpower's prayer or request for relief to which no response is necessary in this Answer. To the extent a response is necessary in this Answer, GTE denies the factual allegations contained in paragraph No. 7 of the Petition and states that all relief requested by

Starpower should be denied.

8. In response to paragraph No. 8 of the Petition, GTE states that Section 251(a) of the Act says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations contained in paragraph No. 8 of the Petition.

9. In response to paragraph No. 9 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations of paragraph No. 9 of the Petition.

10. In response to paragraph No. 10 of the Petition, GTE states that Section 251(b)(5) of the Act says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 10 of the Petition.

11. In response to paragraph No. 11 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 11 of the Petition.

12. In response to paragraph No. 12 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 12 of the Petition.

13. In response to paragraph No. 13 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 13 of the Petition.

14. In response to paragraph No. 14 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 14 of the Petition.

15. In response to paragraph No. 15 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 15 of the Petition.

16. In response to paragraph No. 16 of the Petition, GTE states that the relevance on this case of the "Cox/Bell Atlantic Agreement" and the Commission decision in Case No. PUC970069 constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 16 of the Petition.

17. In response to paragraph No. 17 of the Petition, GTE states that the relevance on this case of the "Cox/Bell Atlantic Agreement" and the Commission decision in Case No. PUC970069 constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 17 of the Petition.

18. In response to paragraph No. 18 of the Petition, GTE states that the relevance on this case of the "Cox/Bell Atlantic Agreement" and the Commission's decision in Case No. PUC970069 constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 18 of the Petition.

19. In response to paragraph No. 19 of the Petition, GTE states that the nature of ISP traffic constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph

No. 19 of the Petition.

20. In response to paragraph No. 20 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 20 of the Petition.

21. In response to paragraph No. 21 of the Petition, GTE states that the letter referenced says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 21 of the Petition.

22. In response to paragraph No. 22 of the Petition, GTE states that paragraph No. 22 appears to be a part of Starpower's prayer or request for relief to which no response is necessary in this Answer. To the extent a response is necessary in this Answer, GTE denies the factual allegations contained in paragraph No. 22 of the Petition and states that all relief requested by Starpower should be denied.

23. In response to paragraph No. 23 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 23 of the Petition.

24. In response to paragraph No. 24 of the Petition, GTE states that the interpretation constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 24 of the Petition.

25. In response to paragraph No. 25 of the Petition, GTE states that the Agreement says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 25 of the Petition.

26. In response to paragraph No. 26 of the Petition, GTE states that the relevance on this case of the "Cox/Bell Atlantic Agreement" and the Commission's decision in Case No. PUC970069 constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 26 of the Petition.

27. In response to paragraph No. 27 of the Petition, GTE states that the interpretation constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 27 of the Petition.

28. GTE denies the factual allegations contained in paragraph No. 28 of the Petition, as stated.

29. GTE denies the factual allegations contained in paragraph No. 29 of the Petition, as stated.

30. In response to paragraph No. 30 of the Petition, GTE states that the relevance on this case of the "Cox/Bell Atlantic Agreement" and the Commission's decision in Case No. PUC970069 constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 30 of the Petition.

31. In response to paragraph No. 31 of the Petition, GTE states that the decisions referenced say what they say and any further characterization constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 31 of the Petition.

32. In response to paragraph No. 32 of the Petition, GTE states that the Order of the Public Utilities Commission of Hawaii dated January 7, 1999 says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in

paragraph No. 32 of the Petition.

33. In response to paragraph No. 33 of the Petition, GTE states that the relevance of the decisions referenced constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 33 of the Petition.

34. In response to paragraph No. 34 of the Petition, GTE states that the Order of the Florida Public Service Commission dated September 15, 1998 says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 34 of the Petition.

35. In response to paragraph No. 35 of the Petition, GTE states that the Order of the Florida Public Service Commission dated September 15, 1998 says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 35 of the Petition.

36. In response to paragraph No. 36 of the Petition, GTE states that the Order of the Florida Public Service Commission dated September 15, 1998 says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 36 of the Petition.

37. In response to paragraph No. 37 of the Petition, GTE states that the Order of the North Carolina Utilities Commission dated February 26, 1998 says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 37 of the Petition.

38. In response to paragraph No. 38 of the Petition, GTE states that the Order from the Tennessee Regulatory Authority dated April 21, 1998, says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 38 of the Petition.

39. In response to paragraph No. 39 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 39 of the Petition.

40. In response to paragraph No. 40 of the Petition, GTE states that the Opinion from the United States District Court for the Western District of Texas dated June 16, 1998, says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 40 of the Petition.

41. In response to paragraph No. 41 of the Petition, GTE states that the Order from the Illinois Commerce Commission dated March 11, 1998, says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 41 of the Petition.

42. In response to paragraph No. 42 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 42 of the Petition.

43. In response to paragraph No. 43 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the



allegations made in paragraph No. 43 of the Petition.

44. In response to paragraph No. 44 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 44 of the Petition.

45. In response to paragraph No. 45 of the Petition, GTE states that the Orders of the Federal Communications Commission ("FCC") say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 45 of the Petition.

46. In response to paragraph No. 46 of the Petition, GTE states that the Orders of the FCC say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 46 of the Petition.

47. In response to paragraph No. 47 of the Petition, GTE states that the Orders of the FCC say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 47 of the Petition.

48. In response to paragraph No. 48 of the Petition, GTE states that the Orders of the FCC say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 48 of the Petition.

49. In response to paragraph No. 49 of the Petition, GTE states that the Orders of the FCC say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 49 of the Petition.

50. In response to paragraph No. 50 of the Petition, GTE states that the Orders of the FCC say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 50 of the Petition.

51. In response to paragraph No. 51 of the Petition, GTE states that the Orders of the FCC say what they say and any further characterization of them constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 51 of the Petition.

52. In response to paragraph No. 52 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 52 of the Petition.

53. In response to paragraph No. 53 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 53 of the Petition.

54. In response to paragraph No. 54 of the Petition, GTE states that the allegations made in that paragraph constitute legal conclusions addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 54 of the Petition.

55. In response to paragraph No. 55 of the Petition, GTE states that the Order of the Florida Public Service Commission dated September 15, 1998 says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 55 of the Petition.

56. In response to paragraph No. 56 of the Petition, GTE states that the Order of the Illinois Commerce Commission dated March 11, 1998, says what it says and any further characterization of it constitutes a legal conclusion addressed in the accompanying Memorandum of Law. To the extent a response is necessary in this Answer, GTE denies the allegations made in paragraph No. 56 of the Petition.

57. GTE denies the factual allegations contained in paragraph No. 57 of the Petition, as stated.

### **AFFIRMATIVE DEFENSES**

1. The FCC has the exclusive jurisdiction to decide compensation for ISP-bound traffic unless GTE and Starpower expressly agreed – and they did not – to make ISP-bound traffic subject to the reciprocal compensation provisions of their local interconnection agreement.

2. The Petition fails to state a claim upon which relief can be granted.

3. Pursuant to 47 U.S.C. §§ 251 and 252, Starpower is not entitled to the relief it seeks in this Petition.

4. Starpower's Petition is potentially barred, in whole or in part, by a number of defenses including, but not limited to, the doctrine of unclean hands, estoppel, or breach of the covenant of good faith and fair dealing.

GTE reserves the right to assert any other affirmative defense which may become apparent or available during the pendency of this litigation.

WHEREFORE, GTE respectfully requests the Commission to: (1) hold an evidentiary hearing to consider the meaning of the contractual provisions relating to reciprocal compensation and (2) declare that Starpower is not entitled to any reciprocal compensation for ISP-bound traffic under the Agreement.

GTE SOUTH, INC.

Date: July 7, 1999

By:

  
Counsel

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COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

PETITION OF	)	
STARPOWER COMMUNICATIONS, LLC	)	
	)	CASE NO. PUC990023
For Declaratory Judgment	)	
Interpreting Interconnection Agreement	)	
with GTE South, Inc.	)	

**MEMORANDUM OF LAW**

In support of the Answer filed concurrently herewith, GTE South, Inc. ("GTE") submits this Memorandum of Law to address particular legal issues raised by Starpower Communications, LLC ("Starpower") in its Petition For Declaratory Judgment Interpreting Interconnection Agreement with GTE South, Inc. and Directing GTE to pay reciprocal compensation for the termination of local calls to Internet service providers ("Petition") filed with the State Corporation Commission ("Commission") on February 3, 1999 and other legal issues raised by the Commission in its Preliminary Order in this proceeding dated June 22, 1999.<sup>1</sup>

**Introduction**

Traffic bound for internet service providers ("ISPs") is interstate, not local. The interstate nature of ISP-bound traffic places it within the jurisdiction of the Federal Communications Commission ("FCC") and outside the reciprocal compensation provisions of the Interim

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<sup>1</sup> GTE does not waive legal conclusions raised by Starpower in the Petition that are not addressed in this Memorandum.

Interconnection Agreement between GTE and Starpower ("Agreement").<sup>2</sup> The decision by the Commission on the reciprocal compensation provisions of an interconnection agreement between Cox Virginia Telcom, Inc. ("Cox") and Bell Atlantic-Virginia, Inc. ("Bell Atlantic")<sup>3</sup> is irrelevant to this proceeding because it was based on different contractual terms and now-invalidated legal theories. Now that the FCC affirmatively has stated that it asserted interstate jurisdiction over ISP bound traffic with the exemption codified at 47 C.F.R. Part 69 in 1983, the issue in this proceeding is whether GTE and Cox expressly agreed to make this interstate traffic subject to the reciprocal compensation obligations in their local interconnection agreements. The Commission must hold a hearing to decide this issue.

### **Argument**

#### **1. The FCC has jurisdiction over ISP-bound traffic.**

Since the filing of the Petition, the FCC has reiterated its long-standing position that ISP-bound traffic is "largely interstate," and subject to FCC jurisdiction under the 1996 Act. *See* Declaratory Ruling and Notice of Proposed Rulemaking, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier*

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<sup>2</sup> On March 11, 1998, Starpower adopted the terms of the Interim Virginia Co-Carrier Agreement between GTE and MFS Intelenet of Virginia, Inc. under Section 252(i) of the Telecommunications Act of 1996 (the "Act" or "1996 Act").

<sup>3</sup> The interconnection agreement between Cox and Bell Atlantic will be referred to in this Memorandum as the "Cox/Bell Atlantic Agreement." The reciprocal compensation issue related to the Cox/Bell Atlantic Agreement was decided by the Commission in *Petition of Cox Virginia Telecom, Inc. for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet Service Providers*, Case No. PUC970069, Final Order (Oct. 24, 1997) ("Cox/Bell Atlantic Order").

*Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 96-68 (FCC February 25, 1999) (“*ISP Order*”) ¶ 1. In reaching its conclusion, the FCC analyzed “the jurisdictional nature” of ISP traffic by focusing on the “end points,” or the “totality,” of the communication. *ISP Order* ¶¶ 10, 13. That is, the FCC analyzed an ISP call from “the inception of a call to its completion, regardless of any intermediate facilities.”<sup>4</sup> *ISP Order* ¶ 11. The analysis led to the conclusion that ISP calls “do not terminate at the ISP’s local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at [an] Internet website that is often located in another state.” *ISP Order* ¶ 12. Thus, ISP-bound traffic is “largely interstate,” not local.

As the *ISP Order* made clear, the FCC’s conclusions on the interstate nature of ISP traffic simply reaffirmed what has been its consistent position with regard to enhanced service providers (“ESP”) for some time.<sup>5</sup> In fact, the FCC has regarded ISP-bound traffic to be interstate and within its jurisdiction since 1983, when it exempted traffic of ESPs, including ISPs, from interstate access charges due to concerns about the stability of the information services industry.<sup>6</sup>

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<sup>4</sup> See also *ISP Order* ¶ 13 (we “analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site.”).

<sup>5</sup> See, e.g., *ISP Order* ¶ 10 (“the Commission traditionally has determined jurisdictional nature of communications...” (emphasis added) ), ¶ 12 (“Consistent with these precedents, we conclude...” (emphasis added); ¶ 16 (“The Commission traditionally has characterized the link from an end user to an ESP as an interstate access service.”) (emphasis added); an ISP is a type of ESP, fn.1.

<sup>6</sup> *MTS and WATS Market Structure*, Third Report and Order, 93 FCC 2d 241 (1983) (“*Access Charge Order*”). The exemption was granted because ISPs “would experience severe rate impacts were the [the FCC] immediately to assess carrier access charges upon them.” *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 682, 715 at ¶ 83 (1982). Although not intended to be permanent, the exemption has been continued for similar public policy reasons since its inception. See *Amendments of Part 69 of the Commission’s Rules relating to Enhanced Service Providers*, Notice of Proposed Rulemaking, 2 FCC Rcd 4305

(continued . . .)

As the FCC pointed out, an exemption would have been unnecessary if the FCC lacked jurisdiction over ISP traffic. *ISP Order* ¶ 16 (“That the Commission exempted ESPs from access charges indicates its understanding that ESPs in fact use interstate access service; otherwise the exemption would not be necessary.”). In short, the FCC’s continued exemption of ISP traffic from access charges for policy reasons – an exemption it could choose to remove at any time – demonstrates the agency’s long held recognition that such traffic is interstate.

Thus, it is clear that the FCC has jurisdiction over ISP-bound traffic. Accordingly, it is the FCC – not this Commission – that will determine what compensation – if any – is due for ISP-bound traffic. The FCC is presently considering the adoption of a rule governing such compensation.<sup>7</sup>

2. **This Commission would only have jurisdiction if the parties agreed to reciprocal compensation for ISP-bound traffic.**

Pending implementation of its rule, the FCC indicated that there were two instances in which states would have jurisdiction over reciprocal compensation for ISP-bound traffic. First, the FCC stated that it would not interfere with findings already made by state commissions as to whether reciprocal compensation provisions of particular interconnection agreements apply to ISP-bound traffic.<sup>8</sup> *ISP Order* ¶ 21. Second, the FCC declared in the *ISP Order* that state

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(1987); *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, at ¶ 1 (1988) (exemption reasonable given “the current state of change and uncertainty” in the industry).

<sup>7</sup> Notice of Proposed Rulemaking (CC Docket No. 99-68) (“NPRM”).

<sup>8</sup> In a petition filed with the United States Court of Appeals for the District of Columbia Circuit, GTE is seeking judicial review of what Federal Communications Commissioner Michael Powell called sweeping “dicta” set forth in ¶¶ 21-27 of the *ISP Order* regarding the right of state  
(continued . . .)



commissions were free to impose reciprocal compensation obligations if the parties had expressly agreed to such compensation for ISP-bound traffic. *ISP Order* ¶ 22.

Neither of these instances is applicable in this case.

A. The Cox/Bell Atlantic Order is inapplicable.

This Commission has not made a finding on whether the Agreement between Starpower and GTE requires reciprocal compensation for ISP-bound traffic. Thus, this Commission does not have jurisdiction over this case as though it had made such a ruling. Starpower points to the Cox/Bell Atlantic Order as though it were binding in this case. Petition at ¶ 16. The Commission was careful to note, however, that the decision was being made “under the terms of the agreement between Cox and BA-VA.” Cox/Bell Atlantic Order at 1. The terms of the Cox/Bell Atlantic Agreement differ from those in the GTE/Starpower Agreement. The actual language of the agreements, the underlying understandings of the parties, and the facts upon which the agreements were negotiated are all different. In short, the instant case is not identical to the Cox/Bell Atlantic case and cannot be decided as such.

Moreover, the Commission’s decision in the Cox/Bell Atlantic Order was based on legal interpretations that now have been invalidated. Bell Atlantic may not have appealed the decision “for reasons of its own choosing,”<sup>9</sup> but the Commission should not make the same

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commissions to decide compensation for interstate traffic. Similar petitions have already been filed by a number of parties. GTE denies that this Commission has any jurisdiction to award reciprocal compensation for ISP-bound traffic in the absence of an express agreement because this Commission has jurisdiction over only intrastate matters in accordance with federal law. *See, e.g.*, 47 U.S.C. § 251, *et. seq.*

<sup>9</sup> Petition at ¶ 18.

misinterpretations of law here, particularly when they have been expressly rejected by the FCC. In fact, the Commission's ruling was based largely on a finding that directly contradicts the *ISP Order*. Specifically, the Commission's finding that "[l]ocal service provides the termination of such calls at the ISP, and any transmission beyond that point presents a new consideration of service(s) involved" violates the FCC "conclu[sion] ... that the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." *ISP Order* ¶ 12.

When read with the FCC's First Report & Order, the FCC's determination on the termination of ISP traffic is also crucial as it relates to 47 U.S.C. § 251(b)(5). According to the First Report & Order, section 251(b)(5) reciprocal compensation obligations "... apply only to traffic that originates and terminates within a local [calling] area."<sup>10</sup> Accordingly, the FCC's determination that ISP-bound traffic does not terminate at the ISP's local server removes it from section 251(b)(5) of the Act. Thus, there is no legal basis for the Commission to award reciprocal compensation for ISP traffic unless that was expressly provided for in the interconnection agreement.

In sum, the Cox/Bell Atlantic Order dealt with a different agreement between different parties and was based on invalidated legal theories. Accordingly, the Cox/Bell Atlantic Order is not relevant here.

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<sup>10</sup> First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, 16013, ¶ 1034 (1996).

B. The Agreement does not provide for reciprocal compensation for ISP calls.

The Agreement does not provide for reciprocal compensation for calls to ISPs. In fact, the Agreement simply provides, in relevant part, “[f]or the termination of local traffic (including EAS), the Parties agree to an equal, identical and reciprocal rate of ...” Section VI.B (emphasis added). The terms “local” and “termination” were not defined in the Agreement. The plain language of the terms, however, can be understood by examining the FCC’s long-standing interpretations of the meanings of these terms. As discussed above, and as was recently confirmed by the *ISP Order*, the FCC consistently has viewed ISP-bound traffic as interstate, not local. *ISP Order* ¶ 1. It also does not consider ISP traffic to be terminated at the ISP’s local server. *ISP Order* ¶ 12. Accordingly, the Agreement’s limitation on reciprocal compensation to the termination of local traffic, as those terms are understood and interpreted by the FCC, did not provide for payments to be made for interstate, ISP traffic.

Starpower claims that ISP calls amount to local traffic – even though they do not meet the definition of the phrase – because they are placed just as other local calls. Petition at ¶ 19. As discussed above, it is the termination – not the placement – of calls that determines the nature of a communication. Starpower misstates when this termination occurs, claiming that a call is terminated when it is delivered to ISPs. Petition at ¶ 27. As recently confirmed by the FCC, ISP calls “do not terminate at the ISP’s local server.” *ISP Order* ¶ 12. Accordingly, ISP calls are not local traffic within the provisions of the Agreement.

Starpower asserts that ISP traffic is local because GTE “treats calls to ISPs as local traffic in all other contexts.” Petition at ¶ 28. The examples cited by Starpower, however, are wholly irrelevant to the nature of ISP traffic. Instead, they describe treatment that is required of GTE by

law. For example, the FCC ESP exemption discussed above requires that GTE treat its own ISP customers as local business lines. Mandated usage cannot be used as an example of how GTE “treats” ISP-bound traffic.

Similarly, Starpower alleges that GTE “treats” revenues from ISP customers to be local for separations and ARMIS reporting purposes. Petition at ¶ 29. GTE “treats” such revenues as required by the FCC. The FCC, as explained in a letter dated May 18, 1999 from Lawrence E. Strickling, Chief of the FCC’s Common Carrier Bureau to SBC Communications, requires that ISP-bound traffic be classified as intrastate for separations and reporting purposes. Classification of revenues, however, does not mean that ISP-bound traffic is local in nature. In fact, Mr. Strickling explained the *ISP Order* in his letter, noting that the FCC considers ISP-bound traffic to be interstate and under the FCC’s jurisdiction. According to Mr. Strickling, the separations and reporting treatment is necessary to be consistent with the ESP exemption to access charges. Thus, the FCC’s explanation on why ISP-bound traffic is to be treated as intrastate for separations and reporting purposes only solidifies the position that ISP-bound traffic is not local, but only treated as such for access charges for public policy reasons.

Because of the governing definition of the term “local” and the requirement that the traffic terminate to be eligible for reciprocal compensation, ISP traffic would have to have been expressly provided in the reciprocal compensation provisions of the Agreement in order to be covered. It was not. No exception was necessary in the Section VI of the Agreement because ISP-bound traffic was not included in the provision.

C. The Commission must hold a hearing.

It is clear that GTE and Starpower dispute whether the Agreement provides for reciprocal compensation for ISP-bound traffic. Thus, the Commission must commence a hearing to determine the meaning of the Agreement on this issue. As discussed above, it is not sufficient to rely on the Cox/Bell Atlantic Order as the Cox/Bell Atlantic Agreement is not before the Commission. GTE had its own negotiating team and negotiated different language than Bell Atlantic negotiated in its contracts. The meaning behind the language in this Agreement and the facts supporting the development of the language are disputed and must be heard.

As to the Commission's inquiry on consolidating this proceeding with the Petition of Cox Virginia Telecom, Inc. (Case No. PUC990046),<sup>11</sup> GTE believes that the two proceedings should not be consolidated. Both cases will be determined based on whether the respective agreements call for reciprocal compensation for ISP-bound traffic. Each agreement is different and each case has its own unique factual nuances. Accordingly, separate hearings must be held on each Agreement.

3. Starpower's misstatements of the law cannot go unrefuted.

Although GTE expects to have an opportunity to brief fully the law in this case, it cannot allow the more egregious misstatements of the relevant law in the Petition to go unrefuted at this time.

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<sup>11</sup> Preliminary Order at 4.

A. Starpower's reliance on decisions of other state commissions is misplaced.

In an effort to persuade the Commission that ISP traffic is jurisdictionally local, Starpower in its Petition urges the Commission to join other states that purportedly have held that "local calls terminating to ISPs are local traffic for purposes of the reciprocal compensation provisions of the interconnection agreements." Petition at ¶ 31. All of the state decisions cited by Starpower, however, predate the FCC's *ISP Order* and are all irrelevant to this proceeding. In fact, the Massachusetts, Missouri and West Virginia commissions have all since deferred decisions regarding reciprocal compensation for ISP-bound traffic pending the FCC's NPRM on this issue.<sup>12</sup> The Massachusetts Commission vacated a decision cited by Starpower because, in the face of the FCC's *ISP Order*, it realized that it previously had misinterpreted the law:

The Department based its October Order on a mistake of law, i.e., on an erroneous characterization of ISP-bound traffic and on a consequently false predicate for concluding that jurisdiction was intrastate. By basing its jurisdictional analysis and finding on a mischaracterization of the nature of ISP-bound traffic, the Department exceeded its grant of state regulatory authority under the 1996 Act. Although the vague and equivocal terms of Paragraph 27 of the FCC's Internet Traffic Order may suggest that some state commission "might conclude" that their reciprocal

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<sup>12</sup> *Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company d/b/a Bell Atlantic-Massachusetts for Breach of Interconnection Terms Entered Into Under Section 251 and 252 of the Telecommunications Act of 1996*, D.T.E. 97-11-C, Order, (Massachusetts Department of Telecommunications and Energy ("Massachusetts Commission"), May 19, 1999) <<http://www.state.ma.us/dpu/telecom/97-116-c/97-116-c.htm>> ("Massachusetts Order"); *In the Matter of the Petition of Birch Telecom of Missouri, Inc. for Arbitration of the Rates, Terms, Conditions and Related Arrangements for Interconnection with Southwestern Bell Telephone Company*, Case No. TO-98-278, Order Denying Application for Rehearing (Missouri Public Service Commission, March 9, 1999), Order Clarifying Arbitration Order (Missouri Public Service Commission, April 6, 1999); *Spring Communications Company L.P. Petition for a Declaratory Ruling from the Commission on Treatment of Calls to Internet Service Providers*, Case No. 99-0166-T-PC, Commission Order (Public Service Commission of West Virginia, May 7, 1999).

compensation orders remain viable, the FCC has, to put the matter baldly, rendered the DTE's October Order in MCI Worldcom -as a practical matter- a nullity. Pace the FCC's consoling notion that some states' orders might stand on state "contractual principles or other legal or equitable considerations," Internet Traffic Order at ¶ 27, our Order stood squarely, expressly, and exclusively on a "two-call" premise. That foundation has crumbled. There is no alternative or supplemental finding in our October 1998 Order to rely on in mandating continued reciprocal compensation for ISP-bound traffic. In view of the FCC's practical negation of the legal and analytic basis of our October Order, we see no logical alternative to vacating that Order...<sup>13</sup>

B. Starpower misstates FCC precedent.

Starpower's discussion of FCC precedent in paragraphs 45-53 of the Petition is simply wrong, particularly in light of the Commission's description of its own precedent in the *ISP Order*. Starpower begins by claiming that that the FCC's order on GTE's federal tariff for ADSL service<sup>14</sup> does not govern the reciprocal compensation issue. Petition at ¶ 46 (the *ADSL Order* "states clearly that the decision has no impact on the reciprocal compensation issue"). That is of no consequence now that the *ISP Order* now governs this legal issue and squarely finds that ISP traffic to be interstate. *ADSL Order* ¶ 2 ("We ... intend ... to issue a separate order specifically addressing reciprocal compensation issues."). The *ADSL Order*, however, was consistent in its long standing approach to analyzing the totality of a communication, recently confirmed by the *ISP Order*. *ADSL Order* ¶ 17 ("the commission traditionally has determined

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<sup>13</sup> *Massachusetts Order*. See also *Bell South Telecommunications, Inc. v. Intermedia Communications*, Judgment, Civil Case 3:99CV5MU (W.D.N.C. May 20, 1999) (a federal district court remanding a reciprocal compensation case "to give the NCUC an opportunity to reexamine its conclusions with the benefit of the recent FCC ruling."

the jurisdictional nature of communications by the end point of the communication and consistently has rejected attempts to divide the communications at any intermediate points of switching or exchanges between carriers.”).

In fact, the other FCC orders cited by Starpower, such as the *Access Charge Reform Order*, recognized that ISP-bound traffic was interstate in nature and within the jurisdiction of the FCC. That is why the Commission needed to grant an exemption for ESP traffic from access charges. As discussed above, the Commission reiterated in the *ISP Order* the necessity for an access charge exemption given the interstate nature of ISP-bound traffic.

Perhaps most egregious is Starpower’s assertion that “prior decisions of the FCC ..., in every decision since the passage of the Telecommunications Act, has made it clear that it also recognized that calls to ISPs consist of two components: a telecommunications component and an information services component.” Petition ¶ 48. Contrast this assertion with the FCC’s own words in the *ISP Order*:

This definition recognizes the inseparability, for purposes of jurisdictional analysis, of the information service and the underlying telecommunications. ¶ 13.

Thus, we analyze ISP traffic for jurisdictional purposes as a continuous transmission from the end user to a distant Internet site. ¶ 13.

We find that this argument is inconsistent with Commission precedent, discussed above, holding that communications should be analyzed on an end-to-end basis, rather than by breaking the transmission into component parts. ¶ 15.

The outright rejection of Starpower’s interpretation of FCC precedent – by the FCC – could not be clearer.

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<sup>14</sup> *In the Matter of GTE Telephone Operating Cos., GTOC Tariff No. 1, and GTOC Transmittal No. 1148*, CC Docket 98-79, FCC 98-292 (Oct. 30, 1998) (“*ADSL Order*”).



C. Awarding reciprocal compensation for ISP-bound traffic would be anti-competitive.

Starpower asserts that treating ISP-bound traffic as interstate would have “severe and far-reaching anti-competitive implications.” Petition at ¶¶ 54-57. It is well documented, however, that the reverse is true. Treating ISP-bound traffic as local and subject to reciprocal compensation would have enormous anti-competitive effects. CLECs that serve primarily ISPs are not bestowing the benefits of the competition on consumers; they are merely attempting to take advantage of a loophole in the law at the expense of ILECs. As noted in an in-depth report by Merrill Lynch released in October 1998 (“Merrill Lynch Report”), CLECs, such as Starpower, are reaping enormous windfall profits from reciprocal compensation. According to the Merrill Lynch Report, these profits have the potential to result in “four unintended consequences that are detrimental to the public interest and intent of the 1996 Act: (1) wealth transfers ... (2) development of competition delayed ... (3) disincentive to compete for end-user customers ... (4) disincentive to invest in local infrastructure.” Merrill Lynch predicted that “if the FCC rules that internet-destined traffic is interstate, the arbitrage game on reciprocal comp would be over – meaning ILECs/RBOCs would no longer pay the CLECs for ISP-destined traffic.” The FCC in its *ISP Order* has done precisely what Merrill Lynch predicted would be the end to the arbitrage game played by CLECs who serve primarily ISPs.

In fact, state commissions are beginning to recognize the arbitrage and windfall opportunities enjoyed by CLECs as a result of imposing reciprocal compensation arrangements on ISP traffic. In vacating its own prior order requiring Bell Atlantic to pay reciprocal compensation for ISP traffic, the Massachusetts Commission declared:

The unqualified payment of reciprocal compensation for ISP-bound traffic . . . does not promote real competition in telecommunications. Rather it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition. A loophole, in a word . . . . One would not expect profit-maximizing enterprises like CLECs and ISPs, rationally pursuing their own ends, to leave it unexploited . . . . But regulatory policy, while it may applaud such displays of commercial energy, ought not to create such loopholes or, once having recognized their effects, ought not leave them open.

Real competition is more than just shifting dollars from one person's pocket to another's. And it is even more than the mere act of some customers' choosing between contending carriers. Real competition is not an outcome in itself - it is a means to an end. The "end" in this case is economic efficiency, which Baumol and Sidek have defined as "that state of affairs in which, as the specialized literature of welfare economics recognized, no opportunity to promote the general welfare has been neglected. Such an opportunity is defined as the availability of a course of action that will benefit at least some individuals, in their own estimation, *in a way not achieved at the expense of others.*" Failure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenance and, to some degree, encouraging waste of those resources. Clearly continuing to *require* payment of reciprocal compensation . . . is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of certain CLECs, ISPs and their customers, at the expense of Bell Atlantic's telephone customers and shareholders.

*Massachusetts Order.*

Starpower also comments that GTE will be able to gain "monopoly power over local exchange service to ISPs" if reciprocal compensation is not paid for ISP traffic. Petition at ¶ 57. GTE, however, is not in a position to engage in the type of arbitrage engaged in by CLECs and explained by Merrill Lynch and the Massachusetts Commission. CLECs are able to pay ISPs to

be their customers so that they will reap reciprocal compensation from ILECs, whose customers are making the ISP calls. ILECs cannot make similar payments to ISPs, and CLECs do not have mandated service territories of customers making ISP calls. Thus, Starpower's claim about GTE obtaining monopoly power over local exchange service to ISPs is incorrect.

### **Conclusion**

ISP-bound traffic is interstate, not local. Accordingly, it is not within the jurisdiction of this Commission unless the Agreement expressly included reciprocal compensation provisions for ISP-bound traffic. The Commission must hold a hearing to determine whether the Agreement included application of reciprocal compensation provisions to ISP-bound traffic. As GTE will show at the hearing, the Agreement did not contain such terms and cannot be interpreted as such given the FCC's long standing – and recently confirmed – interpretation of ISP-bound traffic and the related terms.



COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

PETITION OF	)	
STARPOWER COMMUNICATIONS, LLC	)	
	)	CASE NO. PUC990023
For Declaratory Judgment	)	
Interpreting Interconnection Agreement	)	
with GTE South, Inc.	)	

**ADDITIONAL COMMENTS**

GTE South, Inc. ("GTE") submits these Additional Comments to address issues raised by Starpower Communications, LLC ("Starpower") in its Response to the Memorandum of Law Filed by GTE South, inc. ("Starpower Response") filed with the State Corporation Commission ("Commission") on July 19, 1999. In particular, GTE takes exception to Starpower's request that the Commission issue a ruling that GTE is obligated to pay reciprocal compensation for calls to ISPs based solely "on the pleadings." Starpower Response at 24. By presenting a factual dispute that may be resolved only through an evidentiary hearing, the pleadings are inadequate to assess the contractual intent of the parties.

**Preliminary Statement**

Starpower presents a misleading interpretation of the effect of the February 26, 1999 Order ("*ISP Order*") from the Federal Communications Commission ("FCC").<sup>1</sup> Starpower

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<sup>1</sup> *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68 (rel. Feb. 26, 1999).

attempts to gloss over the FCC's determination that ISP-bound traffic is "largely interstate" and therefore beyond the reach of Section 47 U.S.C. Section 251(b)(5), and that the FCC's confirmation as to the nature of ISP-bound traffic undercuts the determinations of dozens of state commissions nationwide during the last two years. *ISP Order* ¶ 1.

Starpower also misinterprets paragraphs 21-27 of the *ISP Order*, as they apply to this proceeding. The FCC concluded in these paragraphs that 1) parties to a prior commission decision were bound to the that decision; 2) parties were bound to their agreements to the extent they voluntarily decided to include ISP-bound traffic in their local interconnection agreements; and 3) state commissions could arbitrate inter-carrier compensation for ISP-bound traffic pursuant to Section 252 pending the FCC's Notice of Proposed Rulemaking on this issue.

Condition No. 1 does not apply to GTE, however, because it was not a party to the Bell Atlantic decision cited by Starpower. Nor is this Commission being asked to arbitrate this issue under Section 252; therefore, condition No. 3 is inapplicable. All that this Commission can decide is -- as condition No. 2 indicates -- whether GTE and MFS Intelenet Service of Virginia, Inc. ("MFS Intelenet") expressly agreed to include ISP-bound traffic in their interconnection agreement. That inquiry is fact-specific and demands, as a matter of well-settled law, an evidentiary hearing on the issue of intent.

### **Argument**

1. **This proceeding amounts to a factual dispute on the intent of the parties.**

The Petition filed by Starpower that originated this proceeding ("Petition") asked the Commission to interpret the "traffic exchange provisions" of the Interim Virginia Co-Carrier Agreement between GTE and MFS Intelenet of Virginia, Inc. (the "Agreement") that was

adopted by Starpower under Section 252(i) of the Telecommunications Act of 1996. MFS Intelenet, made a party to this Case pursuant to the Preliminary Order issued by the Commission on June 22, 1999, argues in its comments that the Agreement should be construed according to the "parties' intent ... [at] the time of contracting." MFS Intelenet Comments at 10. As made clear in GTE's Answer and Memorandum of Law, GTE disagrees with MFS Intelenet's conclusion that "MFS and GTE intended that reciprocal compensation payment obligations would apply to Internet traffic." MFS Intelenet Comments at 11-12. Thus, the Commission is presented with a factual dispute regarding the contractual intent of the parties. Accordingly, the Commission must conduct an evidentiary hearing to determine the intent of GTE and MFS Intelenet when they entered into the Agreement.

2. Other agreements are not controlling.

Starpower attempts to cloud the issue of the intent of GTE and MFS Intelenet by citing to decisions regarding different agreements entered into by different parties. Starpower Response at 8, 15-20. Agreements between other parties are hardly relevant – and clearly not controlling – on the intent of GTE and MFS Intelenet in entering into their interconnection agreement. Yet Starpower claims that the Commission has "already resolved the issue" in the context of the agreement between Cox and Bell Atlantic. Starpower Response at 8. Starpower is wrong. In the Commission's own words, the Commission's decision was made "under the terms of the

agreement between Cox and BA-VA,"<sup>2</sup> not under the terms of the agreement between MFS Intelenet and GTE.

Moreover, Starpower claims that the Commission's interpretation of the Cox/Bell-Atlantic agreement is somehow binding on the GTE/MFS Intelenet agreement because the two agreements – entered into by different parties – are “not materially different.” Starpower Response at 8. Obviously, the Commission's interpretation of the intent of the parties as to one agreement would not be binding as to the intent of a different parties to a different contract.

Starpower seeks further support from interpretations by other state commissions of different agreements entered into by different parties. Starpower Response at 15-20. Of course, these citations are no more helpful than the Cox/BA agreement to understanding the intent of MFS Intelenet and GTE when they entered their agreement. In addition to being between different parties and using different language, these interpretations were based on different negotiations and do not shed light on the understandings of GTE and Intelenet in entering into their agreement.

3. A hearing is necessary to allow each party to offer evidence of contractual intent.

Rather than rely on decisions related to different agreements of other parties, the Commission must hold an evidentiary hearing to do what MFS Intelenet agrees is necessary: determine “the parties’ intent ... with respect to the time of contracting.” MFS Intelenet

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<sup>2</sup> *Petition of Cox Virginia Telcom, Inc. for enforcement of interconnection agreement with Bell Atlantic-Virginia, Inc. and arbitration award for reciprocal compensation for the termination of local calls to Internet Service Providers*, Case No. PUC970069, Final Order (Oct. 24, 1997).



Comments at 11-12. Each party will then be able to put forth their evidence on conduct, trade usage and any other factor that shows the intention of the parties. GTE will show that the parties did not agree or even suggest that ISP calls were to be included in the definition of "local traffic," and thus subject to reciprocal compensation. As discussed in GTE's Memorandum of Law, the belief that ISP calls were not local calls was consistent with the general usage of the phrase at the time, as confirmed by the FCC's long-standing – and recently reiterated – interpretation of ISP-bound traffic as interstate in nature.

### **Conclusion**

The Starpower Response must not be permitted to obfuscate the contractual intent issue that is central to this proceeding. Contractual intent cannot be ascertained based on contested facts set forth in opposing pleadings. Instead, an evidentiary hearing is necessary for the Commission to interpret the intention of the GTE and MFS Intelenet when they entered into the interconnection agreement.

COMMONWEALTH OF VIRGINIA  
STATE CORPORATION COMMISSION

PETITION OF  
STARPOWER COMMUNICATIONS, LLC

For Declaratory Judgment  
Interpreting Interconnection Agreement  
with GTE South, Inc.

CASE NO. PUC990023

**MOTION TO FILE ADDITIONAL COMMENTS**

Pursuant to the Preliminary Order of the State Corporation Commission ("Commission") dated June 22, 1999 in the above referenced proceeding, GTE South, Inc. ("GTE") responded to the petition filed by Starpower Communications, LLC ("Starpower") with an Answer and Memorandum of Law on July 7, 1999. Pursuant to the same Preliminary Order, Starpower filed a Response to the Memorandum of Law Filed By GTE South, Inc. ("Starpower Response") on July 19, 1999. The Starpower Response requests that the Commission issue a Final Order in this proceeding based on the pleadings. Starpower Response at 24. GTE hereby requests to respond briefly to Starpower's assertion that no hearing is necessary to resolve the issues presented in its Petition.

WHEREFORE, GTE respectfully requests the Commission to allow GTE to file the Additional Comments attached to this Motion.

Respectfully submitted,

GTE SOUTH, INC.

Date: July 30, 1999

By: \_\_\_\_\_

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